## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | 1 |
| STATEMENT OF THE CASE | 1 |
| REASONS WHY PETITION SHOULD BE DENIED | 3 |


## AUTHORITIES CITED

Cases


*Admiral Merchants Motor Freight, Inc.* v. *United States*, 321 F. Supp. 353 (D. Colo. 1971) aff'd *per curiam*, 404 U.S. 802 (1971) ..... 5, 6-7, 9, 10

*Aluminum Co. of America* v. *Admiral Merchants Motor Freight, Inc.*, 486 F. 2d 717 (7th Cir. 1973), *cert. denied*, —— U.S. ——, 38 L.Ed. 2d 739 (1973) ..... 10

*Feinstein* v. *N. Y. Central R.*, 159 F. Supp. 460 (S.D. N.Y. 1958) ..... 8, n.5

*Informal Procedure for Determining Motor Carrier and Freight Forwarders Reparations*, 335 I.C.C. 403 (1969) ..... 9

*Middlewest Motor Freight Bureau* v. *United States*, 433 F. 2d 212 (8th Cir. 1970), *cert. den.*, 402 U.S. 999 (1971) ..... 4, 5, 7

*Mohasco Industries, Inc., et al.* v. *Acme Fast Freight, Inc., et al.* 491 F. 2d 1082 (5th Cir. 1974) ..... 2, 3-4

*Texas and Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) ..... 7

*T.I.M.E. Inc.* v. *United States*, 359 U.S. 464, 465 (1959) ..... 1, 3, 7, 8, 11

*U.S.* v. *Davidson Transfer and Storage Co.*, 259 F. 2d 802, 806 (D.C. Cir. 1958) revd. on other grounds, 359 U.S. 464 (1959) ..... 8, n.5


Interstate Commerce Act


Part II, 49 U.S.C. §§ 301, *et seq.* ..... 3, 11

Part IV, 49 U.S.C. § 1001 ..... 8, n.4

AUTHORITIES CITED—Continued


| | Page |
|---|---|
| Section 15(7), 49 U.S.C. § 15(7) | 6, n.3 |
| Section 204a, 49 U.S.C. § 304a | 5, 7, 8, 9 |
| Section 216(e), 49 U.S.C. § 316(e) | 9 |
| Section 216(g), 49 U.S.C. § 316(g) | 2, 4, 6, n.3 |
| Section 216(j), 49 U.S.C. § 316(j) | 7 |
| Section 406a, 49 U.S.C. § 1006a | 8, n.4 |
| **Rules:** | |
| U.S. Sup. Ct. 19(1) | 3 |

IN THE

# Supreme Court of the United States

No. 73-1958

MOHASCO INDUSTRIES, INC., *et al.*,
*Petitioners,*

v.

ACME FAST FREIGHT, INC., *et al.*,
*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## QUESTION PRESENTED

"Can a shipper of goods by a certificated motor carrier challenge [in a suit for restitution] the reasonableness of the carrier's charges which were made in accordance with the tariff governing the shipment?" *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464, 465 (1959).

## STATEMENT OF THE CASE

The National Motor Freight Classification is the tariff filed with the Interstate Commerce Commission which contains the classifications of property for rate making purposes governing transportation by motor common carriers

and freight forwarders.[1] On or about December 1, 1967 there were filed with the Commission numerous new classifications of furniture. Many articles were put in higher classes and some were put in lower classes. Over protest the Commission permitted the new classifications to become effective, but instituted an investigation of their reasonableness under Section 216(g) of the Interstate Commerce Act (49 U.S.C. 316(g), App. to Pet., p. 21a). On November 17, 1970 it issued a decision finding that the new classifications were "not shown to be just and reasonable" and ordering them cancelled on or before December 18, 1970. The carriers complied with the order.

On May 12, 1972 Mohasco Industries, Inc. and three subsidiaries (hereinafter Mohasco) sued several motor carriers and freight forwarders (hereinafter Carriers) in the United States District Court for the Southern District of Mississippi to recover the difference between freight charges calculated at the new classifications and freight charges calculated at the old classifications on shipments of furniture transported for them between January 1, 1968 and December 17, 1970.[2] The District Court dismissed the complaint for failure to state a claim upon which relief could be granted and the Court of Appeals affirmed its judgment. *Mohasco Industries, Inc., et al.* v. *Acme Fast Freight, Inc., et al.* 491 F. 2d 1082 (5th Cir. 1974).

---

[1] All commodities moving in commerce are assigned to one or more of fifteen classes on the basis of their transportation characteristics, e.g., weight per cubic foot as packed for a shipment, value, susceptibility to loss or damage. The higher the class the higher the rate.

[2] Mohasco's complaint erroneously assumed that the changed classifications took effect on January 1, 1968. In fact they took effect on January 16, 1968.

## REASONS WHY PETITION SHOULD BE DENIED

Rule 19(1) of the Rules of this Court indicates "the character of reasons" it will consider in determining whether there are "special and important" reasons to review decisions of courts of appeals on writ of certiorari:

> "Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

We examine the decision here in the light of these considerations. Plainly, the Court of Appeals did not decide a "state or territorial question" and did not depart, or sanction the departure by a lower court, "from the accepted and usual course of judicial proceedings." Nor did it decide a federal question which has not been settled by this Court or in a way in conflict with applicable decisions of this Court. Quite the contrary. In *T.I.M.E.*, *supra*, this Court held that the Motor Carrier Act of 1935, now Part II of the Interstate Commerce Act, created no cause of action for the recovery from motor carriers of charges based on unreasonable rates, and that no such cause of action which may have preexisted that Act survived it. The Court of Appeals applied that holding here, *viz*:

> "[F]rom and after the decision in *T.I.M.E.*, unless Congress by statute should direct to the contrary,

> the shipper had no remedy in the courts on common law principles by which he could sue, after the fact, for the restitution of charges collected by motor carriers on tariffs duly filed with and left in effect by the Interstate Commerce Commission." (App. to Pet., p. 149; 491 F. 2d at 1084).

We come then to the question whether, as Mohasco contends, the decision here is in conflict with the decision in *Middlewest Motor Freight Bureau* v. *United States*, 433 F. 2d 212 (8th Cir. 1970), cert. den. 402 U.S. 999 (1971). There, as here, increases in rates took effect while the Commission was in the course of formally investigating their lawfulness under Section 216(g). There, as here the Commission found the increases "not shown to be just and reasonable" and ordered them cancelled on or before a date certain. The carriers there then did what the carriers here did not do. They brought suit to set aside the Commission's order, and sought and were granted a temporary restraining order against its enforcement. By means of the temporary restraining order the carriers there avoided compliance with the Commission's order and kept the increases in effect after the date on which they had been ordered cancelled. In contrast, the carriers here complied with the Commission's order by cancelling the increases on the date the order fixed.

The temporary restraining order in *Middlewest* was dissolved as having been improvidently granted when the District Court denied a preliminary injunction, and the suit to set aside the Commission's order was thereafter dismissed. Shippers then sought restitution. The Court of Appeals held that the Commission's order directing the cancellation of the increases in rates rendered them unlawful as of the effective date of the order and granted restitution of the difference between the higher freight charges collected during the period of the temporary

restraining order and the lower freight charges that would have been collected had the increases been cancelled on the date the Commission's order required.

The Court in *Middlewest* was at pains to distinguish the case before it, in which a remedy in restitution lay, and cases such as that before the Court here, in which only a remedy in reparations lies. It explained that a suit for reparations under Section 204a of the Act (49 U.S.C. 304a, App. to Pet., p. 17a) is the remedy where, as in the case here, the claim is that applicable rates lawfully collected under the outstanding regulations and orders of the Commission exceeded just and reasonable rates. Hence, said the Court, any proceeding involving reparations, whether administrative or judicial, requires a finding by the Commission "as to what a specific just and reasonable rate is." 433 F. 2d at 232. In contrast, restitution was the remedy where, as in the case there, the claim was for monies collected under rates that the Commission had ordered cancelled and that would not have been collected but for the improvident judicial restraint of the Commission's order. In the latter case the Court was not adjudicating anything involving the primary jurisdiction of the Commission, but rather merely giving effect to the Commission's order of cancellation which had been improvidently restrained. As the Court held:

> "*The question of restitution arises because the carriers invoked the aid of the federal courts performing their equitable functions.* Traditionally, the restitution remedy has been available to persons who are injured by the restraint of an administrative agency order where that restraint was not warranted." 433 F. 2d at 241 (Emphasis supplied).

Mohasco also points to *Admiral Merchants Motor Freight, Inc.* v. *United States*, 321 F. Supp. 353 (D. Colo. 1971), aff'd *per curiam*, 404 U.S. 802 (1971). In

that case motor carriers filed increases in rates. The Commission refused to suspend the increases but instituted a formal investigation of them and set a date for hearing. The carriers requested that the hearing be postponed for ninety days. The Commission granted the request upon the condition that the carriers make refund to shippers on shipments moving after the date it had set for hearing to the extent that all or any part of the increases were not approved. Upon completion of the investigation the Commission found the increases not shown to be just and reasonable and ordered the carriers to make refund in accord with the condition.

The District Court of three judges dismissed the carriers' suit to set aside the Commission's order requiring refunds. The first ground of the decision was that the Commission, having discretion to issue appropriate procedural orders, e.g., to grant or deny a postponement of the hearing, had authority to condition such orders as it did.[3] The second ground was that the carriers, having withdrawn an initial objection to the order imposing the condition and having accepted the benefit of the postponement of the hearing were equitably estopped from the relief they sought. To quote the Court:

> "While we do not commend the Commission's procedure as one which should be or could be practiced, we do hold that the peculiar facts of this case, arising as they did, are such as to not justify the granting of the relief requested, namely, annulment of the

[3] Section 15(7), 49 U.S.C. Section 15(7), which gives the Commission authority to investigate increases in rail rates, also gives it authority to enter orders requiring railroads to make refund of such portion of the increased rates as it finds not justified. Section 216(g) under which the Commission proceeded in *Admiral Merchants* and in the case here, gives it no such authority over motor carriers and the Congress has ignored its request that Section 216(g) be amended to give it the authority to "impose refund provisions in proceedings" on increases in the rates of motor carriers. 86th Annual Report to Congress (1972), p. 91.

Commission's order and approval of the carriers' conduct." 321 F. Supp. at 360.

As the Court in *Admiral Merchants* said, that case and *Middlewest* are "somewhat analogous." The analogy the Court found lay in the fact that in both cases the courts did no more than give effect to the Commission's orders. 321 F. Supp. at 360. In contrast, in this case there was no order of the Commission to which the Court could give effect. The only order of the Commission directed the cancellation of tariffs by a date certain and the carriers complied with it.

Mohasco argues that the Congress in effect overruled *T.I.M.E.* when it amended Section 204a of the Act in 1965 to create a cause of action for reparations. The theory is that the creation of a statutory remedy in reparations was a legislative declaration that the "savings clause" in Section 216(j) of the Act (49 U.S.C. 316(j), App. to Pet., p. 22a), which preserves "not inconsistent" common law remedies, is to "be regarded as preserving a *different* and (in present circumstances) a more fitting retrospective remedy than Congress has now directly incorporated into the Act." (Pet., p. 8; Emphasis in the original).

*T.I.M.E.* squarely held that no common law right to recover unreasonably high freight charges from motor common carriers survived the passage of the Motor Carrier Act. In so holding this Court relied in part on *Texas and Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), which held that no such right against railroads survived the passage of Part I of the Act "despite the existence [therein] of a savings clause much broader in scope than that" in Part II. 359 U.S. at 473. As *Abilene* further held, contrary to the contention of Mohasco, the creation of a statutory remedy argues against the existence of a common law remedy.

All Section 204a does is create a statutory remedy. As the Court of Appeals held, a mere reading of it makes "at once apparent that Congress did not alter or expand the 'savings clause'." Neither did it change any other provisions of the Act. In other words, the Congress did not legislatively interpret the Act differently than this Court had so as to restore a common law remedy. Instead, it did what it had not previously done, namely, create a cause of action for reparations against motor carriers.[4]

Mohasco notes that the Commission is "reported" to be of the view that the remedy in restitution survived the passage of the Motor Carrier Act, and that allowance of the remedy would further the purpose of the Act. This is of course the view this Court rejected in *T.I.M.E.* This Court there held that no common law right to reasonable rates survived because only the Commission can determine what rates are reasonable and the Commission's only authority respecting the rates of motor carriers is prospective.[5]

After the decision in *T.I.M.E.* the Commission urged the Congress to give it jurisdiction to entertain complaints and award damages aaginst motor carriers for the collection of unreasonably high rates in the past. The Congress refused to do so. Instead, it gave the Commis-

---

[4] Three of the Respondents here are freight forwarders brought under regulation by the Commission in 1942 with the enactment of Part IV of the Interstate Commerce Act. Part IV contans no "savings clause" at all. Hence, there can be no doubt that the only remedy against them is the cause of action in reparations created in Section 406a of the Act, 49 U.S.C. 1006a, which is the same as, and was enacted simultaneously with, Section 204a.

[5] A finding that increases in rates are "not shown to be just and reasonable", the finding here, is not a finding that they are unreasonable. *Middlewest*, 433 F.2d at 222; *U.S.* v. *Davidson Transfer and Storage Co.*, 259 F.2d 802, 806 (D.C. Cir. 1958), revd. on other grounds 359 U.S. 464 (1959); *Feinstein* v. *N. Y. Central R.*, 159 F. Supp. 460 (S.D. N.Y. 1958).

sion the limited retrospective authority contained in Section 204a, i.e., ancillary authority to determine reasonableness in the past in aid of the jurisdiction to entertain suits for reparations that it gave the courts. See *Informal Procedure for Determining Motor Carrier and Freight Forwarders Reparations*, 335 I.C.C. 403 (1969). In that case the Commission, upon review of the legislative history of Section 204a, concluded that it could determine the reasonableness of rates in the past only upon formal complaint under Section 216(e) of the Act and then only after suit for reparations had been instituted.

Mohasco does not deny that the statutory remedy provided in Section 204a was available to it. (Pet. pp. 3-4, 11 n.7). It excuses its failure to invoke that remedy on the ground that the Commission had entered an "order" in which it stated that the "true basis of the shippers' right to a refund is their common law remedy for restitution." (Pet., p. 4.) That "order" had nothing to do with this case. It was made to support a motion in *Admiral Merchants*, *supra*, to dismiss the suit to set aside its refund order for want of jurisdiction over the subject matter.[6] The theory was, as stated in the memorandum supporting the motion, that the refund order was not judicially reviewable because it was "not a requirement imposed by the Commission under the Interstate Commerce Act," but merely a declaration of the Commission's view of the carriers' equitable obligation and common law duty. The District Court disagreed, holding that it had jurisdiction to review the order and that the case was one to be decided by a three-judge court. 321 F. Supp. at 357. The Commission and the

[6] The "order" of the Commission in which the statement is made commences as follows: "Voted to authorize the General Counsel to state to the District Court in a motion to dismiss the action . . . that the true basis. . . ." Of ten Commissioners sitting three dissented and three did not vote.

United States moved to dismiss the carriers' appeal to this Court for want of jurisdiction. This Court entertained the appeal and affirmed the judgment. 404 U.S. 802. The United States District Courts entertain suits by shippers to collect the refunds under their jurisdiction to enforce orders of the Commission. *Aluminum Co. of America* v. *Admiral Merchants Motor Freight, Inc.*, 486 F. 2d 717 (7th Cir. 1973), *cert. denied*, —— U.S. ——, 38 L. Ed. 2d 739 (1973).

## CONCLUSION

In sum, Mohasco asks the Court to overrule *T.I.M.E.*, claiming that it "has been eroded by subsequent decisions of other circuits." (Pet., p. 6). We have demonstrated that the two decisions to which Mohasco points do not support its claim. Nor is there any reason for overruling *T.I.M.E.* Its interpretation of Part II of the Interstate Commerce Act was carefully considered and accepted by the Congress. In 1965, six years after the decision, the Congress provided a specific procedure for the recovery of damages against motor carriers and freight forwarders for the collection of unreasonably high rates. In so doing the Congress specifically rejected legislation that would have provided the simpler alternative procedure provided for the recovery of such damages against railroads. Since then the Congress has ignored the Commission's requests for authority to compel refund in precisely the situation in which Mohasco asks the Court to do so. In these circumstances we submit that there is no reason for this Court to re-examine *T.I.M.E.*, and urge that the petition for a writ of certiorari be denied.

Respectfully,

BRYCE REA, JR.
700 World Center Building
918 - 16th Street, N.W.
Washington, D.C. 20006

*Counsel for Respondents*
*Acme Fast Freight, Inc., et al.*

*Of Counsel:*

REA, CROSS & KNEBEL
700 World Center Building
918 - 16th Street, N.W.
Washington, D.C. 20006

Dated: August 9, 1974

## CERTIFICATE OF SERVICE

I, Bryce Rea, Jr., counsel for Respondents herein, hereby certify that, on the 9th day of August, 1974, I served the foregoing Brief on the parties hereto by mailing copies, postage prepaid, to the following:

Richard J. Hardy, Esq., 425 Thirteenth Street, N. W., Washington, D. C. 20004; Richard W. Dortch, Esq., First National Bank Building, Jackson, Mississippi, 39205; Michael P. Regan, Esq., Mohasco Industries, Inc., 57 Lyon Street, Amsterdam, New York 12010; Richard H. Lange, Esq., Mohasco Industries, Inc., 57 Lyon Street, Amsterdam, New York 12010; Samuel Wiener, Esq., 233 Broadway, New York, New York 10007.

BRYCE REA, JR.